the net operating revenues of the railroads in official classification territory to be lower than in any year since 1908, while the property investment had increased by over $1,300,000,000 since that year. And the additional returns for the succeeding months of July, August, and September showed that the downward trend of revenues had by no means run its course.

The blow which the war in Europe struck our industry and commerce is too well known to need amplification here. The railroads in official classification territory must refund loans aggregating over $500,000,000 within the next three years. In view of the enormous European investment in American railroads, and the effect which this great war must have upon the amount of capital available in the next few years and the rate of interest which it will command, it can scarcely be doubted that these railroads must suffer severely from the effects of that conflict.

The dissenting commissioners were not inclined to quarrel with these findings, but they doubted the legality and propriety of the Commission's changing its original decision because of them. Their attitude was, briefly, if this increase was unreasonable in July when the railroads admittedly needed increased revenue, how can the fact of a war in Europe and the fact that the needs of the railroads are greater than had been anticipated make this increase reasonable in December? Commissioner Harlan was inclined to the opinion that the Commission had no legal right or power to be governed in its regulation of rates "by conditions presumably temporary in their nature." [6]

However this may be, it would be unfortunate in the extreme if the Commission had no power to afford temporary relief to the railroads in an emergency. The real danger, as pointed out by both Commissioners Harlan and Clements,[7] is that this temporary relief will be hailed (as, indeed, it seems to have been hailed by many financial journals) as a permanent dispensation and the real remedies urged by the Commission in its original decision cast aside. No sensible merchant, who found his profits steadily declining, would think of making a blanket increase of five per cent in the prices of all his wares. The only permanently efficacious remedy for the general railroad situation would seem to be a thorough revision of rates and redistribution of charges, with an increasing attention to economy and efficiency in railroad management.[8] By these means alone can the Hydra's wounds be cauterized and the Herculean task accomplished.

MILITARY TRIALS OF CIVILIANS IN TIMES OF PEACE. — Not long ago a storm of justifiable protest arose at the action of military authorities in West Virginia in trying and sentencing rioting strikers before military tribunals, without jury. The fact that this action was

[6] See 32 I. C. C. 325, 335.

[7] See 32 I. C. C. 325, 335.

[8] Public hearings will commence this month upon a petition for a general increase of rates by the roads west of the Mississippi River. But the western roads are not asking for a horizontal increase in all rates, but propose a general overhauling of rates with advances ranging from two to thirty per cent according to traffic conditions.

upheld [1] by the Supreme Court of that state renders a recent Montana case peculiarly welcome. The latter case declares that while the exigencies of the situation as determined by the governor warranted the summary arrest and detention of persons guilty of rioting or likely to foment trouble, the military authorities were without constitutional power to establish courts and try offenders, and that sentences thus imposed were invalid. *Ex parte McDonald, In re Gillis*, 143 Pac. 947.

Military tribunals are of two kinds, courts martial and military commissions.[2] The former are created by act of Congress with jurisdiction limited to the trial of offenses against the Articles of War and other enactments passed for the government of the army and navy. They are without power over civilians.[3] Military commissions derive their sanction from the laws of war, and are organized to administer military justice in cases not provided for in the Articles of War.[4] Civilians are amenable to their jurisdiction when enemy territory, or domestic territory having temporarily the same status owing to the politically organized rebellion of its inhabitants, is placed under military government [5] during hostile occupation.[6] Such persons are protected by no constitutional guaranties.[7] Civilians may also become amenable to military courts when so-called martial law or, better, martial rule, is inaugurated under the war power in domestic territory which is the actual theater of war. The power to govern such territory with the military seems to be a necessary implication from the power to wage war.[8]

But martial law or martial rule established by the chief executive of a state for the suppression of internal disorder presents a different situation. It has been asserted by eminent authority that the existence of martial rule under such conditions gives the military no greater powers than those ordinarily possessed by peace officers.[9] However, it seems settled that the existence of such martial rule does change the normal legal situation and warrant the use of methods more summary than are

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[1] State *v.* Brown, 71 W. Va. 519, 77 S. E. 243. We are unable at this time to agree with the incidental approval given this case in 26 HARV. L. REV. 636. The discussion then was devoted principally to another question.

[2] See DAVIS, MILITARY LAW, 3 ed., 307.

[3] Except to a very limited extent, see *ibid.* pp. 42, 46.

[4] See *ibid.* pp. 307 ff.

[5] Military jurisdiction is divided into military law, which governs the army and navy; military government, which is imposed upon territory under hostile occupation; and martial law, which denotes the exercise of the military power over domestic territory when called forth by necessity. See the concurring opinion of Chief Justice Chase in *Ex parte* Milligan, 4 Wall. (U. S.) 2, 141. "Martial law" is perhaps a misleading term. The meaning is better expressed by "martial rule." See DAVIS, MILITARY LAW, 3 ed., 300.

[6] See DAVIS, MILITARY LAW, 3 ed., §§ 309 ff.

[7] 2 WILLOUGHBY, THE CONSTITUTION, §§ 720, 721, 732.

[8] See *Ex parte* Milligan, *supra*, p. 127. It has been forcibly argued that no wartime necessity, however great, can authorize the trial of civilian offenders on domestic territory by military courts. See 12 COL. L. REV. 529, 537. In England martial law may thus be extended to territory threatened but not yet in the war zone. See *Ex parte* Marais, [1902] A. C. 109.

[9] See Sir Frederick Pollock in 18 L. QUART. REV. 152; Henry Winthrop Ballantine in 12 COL. L. REV. 529, 534; Franks *v.* Smith, 142 Ky. 232, 134 S. W. 484; Ela *v.* Smith, 5 Gray (Mass.) 121.

available to the ordinary guardian of the peace. Thus the order of a superior officer will under certain conditions justify a homicide otherwise criminal.[10] And persons may be arrested and detained indefinitely during the existence of the disorder merely as a preventive measure, without criminal indictment or charge.[11] But it is one thing to hold that the existence of a state of extreme lawlessness and disorder brings such procedure within the meaning of due process of law, and quite another to recognize that because of such necessity, however great, the executive may, in the exercise of an uncontrolled discretion, entirely suspend the constitutional guaranty of trial by jury and subject the lives and liberties of citizens to the summary jurisdiction of military courts. Law enforcement as an end cannot justify a suspension of the most fundamental law. Where the local courts are open, such procedure does not seem essentially different from that condemned by the United States Supreme Court in a somewhat similar case,[12] but it is submitted that the Montana court is correct in holding that the availability of the local courts is immaterial. While necessity may authorize a great enlargement of executive power within its field, it is difficult to support such executive usurpation of judicial power expressly lodged in another department. Moreover there seems to be no necessity for the immediate trial of offenders who may be imprisoned until their cases can later be brought before the proper tribunal. Nor can the West Virginia procedure be justified under the laws of war, first because the laws of war are only applicable where a state of organized rebellion exists,[13] and second because the power to declare war is vested exclusively in the federal government.[14] The existence of martial rule is justified only by its necessity for the preservation of the peace. It is to restore and not to become a substitute for civil authority; and a practically unlimited power of arrest and detention seems to afford means amply sufficient to bring about this result without further violation of the supremacy of the civil over the military power.[15] The recent utterance of the Montana court affords a salutary answer to the subversive doctrine so recently enunciated in West Virginia.

STATUTORY DISCRIMINATIONS AGAINST NEGROES WITH REFERENCE TO PULLMAN CARS. — A new phase of the Jim Crow question has been presented by statutes which allow railroads to provide sleeping cars, chair

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[10] Commonwealth *v.* Shortall, 206 Pa. St. 165, 55 Atl. 952.

[11] *In re* Boyle, 6 Idaho 609, 57 Pac. 706; *In re* Moyer, 35 Colo. 159, 185 Pac. 190; Moyer *v.* Peabody, 212 U. S. 78.

[12] *Ex parte* Milligan, *supra*, where it was said that military trial in time of war could never be warranted in uninvaded domestic territory where civil courts were sitting.

[13] The distinction between mere riot or insurrection and organized rebellion which gives rise to a state of public war is clearly drawn in The Prize Cases, 2 Black (U. S.) 635, 672, 687.

[14] 2 WILLOUGHBY, THE CONSTITUTION, §§ 730, 714.

[15] COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., p. 435; and see also a learned article on the subject of this note in 5 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, 718.